

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NANCY BETH HINES,

Defendant-Appellant.

UNPUBLISHED
November 2, 2006

No. 262280
Cass Circuit Court
LC No. 04-010191-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

A jury convicted defendant Nancy Beth Hines of embezzlement by an agent, more than \$1,000 but less than \$20,000.¹ The trial court sentenced Hines to two years' probation and ninety days in jail, suspended for six months. Hines appeals as of right. We affirm. We decide this appeal without oral argument.²

I. Basic Facts And Procedural History

Hines was employed by Walters-Dimmick Petroleum as an assistant manager in that company's Jones, Michigan, Shell gas station. On March 14, 2004, a customer was unable to withdraw cash out of the Automatic Teller Machine (ATM) located inside the station. Gas station clerk Teresa Ruwinski could not solve the problem because she did not have access to the cash drawer inside the ATM — only Danielle Payton, the station's manager, Hines, and Scott Schneider, the company's area manager, knew the combination to that lock — so Ruwinski called Hines to help resolve the situation. But when Hines opened the ATM's cash drawer, there was no money in it, even though the ATM report showed it should contain about \$900. Ruwinski testified that, at her request, Hines "somewhat reluctantly" called Schneider to report the missing money. Schneider then visited the store, looked over the audit reports to try to find the error, and then deposited \$540 cash in the ATM so it would operate properly.

¹ MCL 750.174(4)(a).

² MCR 7.214(E).

The next morning, Monday, March 15, 2004, Schneider and other company representatives investigated the incident and discovered that the ATM journal showed a beginning balance in the cash drawer of \$700 on the morning of Friday, March 12, 2004, and an addition of \$1,500 in twenty-dollar bills that day, for a final balance of \$2,200. Hines was on duty that day and did the bookwork. On Saturday, March 13, 2004, there should have been \$1,880 in the drawer. Payton ran the ATM balance, but she did not open the cash drawer because she believed there was enough cash to last through the day. On Sunday, March 14, 2004, Ruwinski ran the ATM balance, without opening the cash drawer, and she testified that she remembered that "about \$900" should have been in the ATM. The ATM journal actually showed that there should have been \$1,180 in the ATM. There were two transactions on Sunday, March 14, 2004: \$180 was successfully withdrawn before a customer received only \$40 of his attempted withdrawal of \$80 because the machine was out of money.

On Monday, March 15, 2004, Schneider and Hines checked the ATM, and it had \$400 inside, exactly what the ATM cassette balance said it should have. The station's audit report showed that Hines recorded that \$1,600 was kept from the station's bank deposits to be added to the ATM that day. The ATM journal showed, however, that only 30 twenty-dollar bills, or \$600, were added to the twenty twenty-dollar bills already in the ATM for a total of \$1,000.

Payton and Schneider also checked the petty cash on March 15, 2004, and discovered that \$300 that should have been locked in a file cabinet was not there. Only Schneider, Payton, and Hines had keys to the cabinet, and Hines, as part of her daily audit report, signed a document indicating that she had counted the petty cash that morning.

Further investigation by the company showed that additional money was missing from the station. Schneider testified at trial that the station's daily reports and ATM reports balanced at the end of February and in prior months. However, on six days in March 2004, the reports balanced but additional funds of \$5,500 were actually missing from the ATM deposits. Those losses occurred in five of six cases when Hines was responsible for the daily reports and deposits, and the sixth instance occurred when Payton was responsible for the bookkeeping, but Hines agreed to and actually made the ATM deposit.

Schneider contacted the Cass County Sheriff. Deputy Davis spoke with Hines on Monday, March 15, 2004, and she denied having access to the petty cash kept in the locked file cabinet in the office. Hines also stated that she made a \$600 deposit to the ATM that morning, but she did not mention that she put \$1,000 in an envelope that should have been in the safe.

Hines testified that, on Monday morning, March 15, 2004, she put \$1,000 in large bills in an envelope and put the envelope in the safe by the register, planning to exchange the large bills at the bank for twenty-dollar bills for use in the ATM when she made the deposit that morning. However, she forgot the envelope when she went to the bank, so she did not make the exchange. She assumed it would be safe until she worked the next day and she planned to deposit the money then. Hines explained that she did not share this information with Schneider because, when she had opportunity to speak with him, she was unaware that deposit was an issue and he did not ask her about it. And she did not tell Davis about the envelope because she believed she needed to speak with an attorney by that point in the conversation.

Hines also testified that she never counted the money in the petty cash box kept in the locked file cabinet. She admitted that she had been trained to do so, and she signed her daily audit reports signifying she had done so; but, because only she and Payton had access, she did not see a reason to do so.

II. Sufficiency Of The Evidence

A. Standard Of Review

Hines argues that her conviction was not supported by sufficient evidence because the prosecution failed to present direct evidence that she was responsible for the missing ATM funds or that she intended to convert the funds to her own use. We review de novo a claim of insufficient evidence.³ This Court determines, viewing the evidence in the light most favorable to the prosecution, whether a rational jury could find “that the essential elements of the crime were proven beyond a reasonable doubt.”⁴ The prosecution must present sufficient evidence to prove its own theory; it is not required to disprove every reasonable theory of the Hines’ innocence, even when relying on circumstantial evidence.⁵ Moreover, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁶ Finally, this Court “is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”⁷

B. Evidence Of Conversion Of The Funds

Embezzlement by an agent of more than \$1,000⁸ requires the prosecutor to prove the following: (1) the money in question belonged to the principal; (2) the defendant had a relationship with the principle as an agent or employee; (3) the money came into the defendant’s possession because of that relationship of trust; (4) the defendant dishonestly disposed of or converted the money to his own use; (5) the act of disposal or conversion was without consent of the principal; and (6) at the time of the conversion, the defendant intended to defraud the principal.⁹

Hines first contends that the prosecution failed to present sufficient evidence that she converted the missing funds to her own use. Specifically, she argues that other people had

³ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

⁴ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

⁵ *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

⁶ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

⁷ *Nowack*, *supra* at 400.

⁸ MCL 750.174(4)(a).

⁹ *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).

access to the store's keys, safe, and the petty cash, and the ATM's combination was written on a paper placed in an unlocked cabinet in the station's office. Moreover, according to Hines, no one witnessed her take the money, and no money was ever found in her possession. We disagree, however, with Hines' argument.

The prosecution presented sufficient evidence to show that Hines converted the funds to her own use. Specifically, Schneider's testimony and the ATM journal and audit reports showed that \$1,000 of the \$1,500 that Hines recorded on the audit report as deposited in the ATM on Friday, March 12, 2004, was not deposited. If Hines had actually made the deposit she recorded in her paperwork, the ATM would have had sufficient cash on Sunday, March 14, 2004, to complete the customer's transaction. Additionally, Hines herself admitted that she deposited only \$600 into the ATM on Monday, March 15, 2004, even though she recorded a deposit of \$1,600 in her daily audit report that morning.

Schneider also testified about four additional discrepancies in amounts recorded and actually deposited for a combined total of \$6,800 in losses on six occasions during March 2004. The losses occurred in five of six instances when Hines was solely responsible for the completing the daily audit report and making the deposits. The sixth instance occurred when Hines agreed to make the ATM deposit to assist Payton. While Hines denied that she worked on all of the days where discrepancies were found, Schneider testified that Hines signed the copies of the store's paperwork. A reasonable jury could decide, believing Schneider's testimony to be more credible, that Hines made the deposits and performed the daily bookkeeping for those days, and thus, that the Hines was responsible for the missing funds.

The prosecution also presented credible evidence that Hines took the \$300 in petty cash. Payton testified that the petty cash was in its usual location on Saturday, March 13, 2004, when she last worked. Hines prepared and initialed the Monday morning audit report, stating that the \$300 in petty cash was in the station. When Payton and Schneider subsequently opened the safe on that Monday, the money was not there. Viewing this testimony in the light most favorable to the prosecution, a reasonable jury could find that Hines took the petty cash. In fact, Hines concedes that a reasonable jury could have reached that conclusion.

Hines further argues that the prosecution failed to prove that Payton or someone else did not take the money. Again, we disagree. Although the prosecution did not prove that Hines was the only one who had the opportunity to commit the crime, it was not required to do so.¹⁰ Rather, the prosecution was only required to introduce "evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide."¹¹ Here, the prosecution produced sufficient evidence that Hines had the opportunity to take the money because of her position as assistant manager. The prosecution also presented evidence that shortages occurred when Hines was responsible for the ATM deposits and had completed and signed the daily audit reports. Finally, at trial, the other employees with access to the money

¹⁰ *Hardiman*, *supra* at 424.

¹¹ *Id.*, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

denied taking the money. Thus, a reasonable jury could have determined beyond a reasonable doubt that the prosecution proved Hines took the money, even in the face of Hines' contradictory evidence.¹²

C. Evidence Of Intent To Defraud

Hines next argues that the prosecutor presented insufficient evidence to show that she intended to defraud her employer. Intent can be inferred from "all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient."¹³ Additionally, which witness to believe on the issue of intent is a matter for the jury.¹⁴ In *People v Lueth*, the defendant, on trial for embezzlement, claimed he had deposited his employer's night deposits into his own bank account because the deposit envelope would not fit into the bank's after hours deposit slot.¹⁵ He claimed that his subsequent repayment of the funds proved he lacked the intent to defraud his employer.¹⁶ This Court held that the jury could reasonably have found that the repayment was due to a change of heart or an attempt to avoid prosecution based on all the circumstances and that the defendant did have the intent to defraud at the time of taking.¹⁷

Here, Hines admitted that she did not deposit into the ATM \$1,000 of the \$1,600 recorded in the paperwork on Monday, March 15, 2004. She testified that she merely forgot to make the exchange at the bank that morning and was planning to do so the next day. However, she also admitted that she did not inform anyone that she had placed the \$1,000 in an envelope in the safe below the register, even when she knew that the money was believed to be missing and that she was a suspect in its disappearance. A reasonable jury, under the circumstances, could infer that Hines, at the time the \$1,000 was converted, intended to defraud her employer, and that the claim about exchanging the large bills was an attempt to avoid prosecution. Additionally, in order to close out each daily audit report, Hines had to manually enter amounts to balance the accounts or she could not open the register for the new day. The evidence of intentionally incorrect entries on days that funds were missing created a permissible inference that Hines intended to defraud her employer each time she manually entered amounts to balance the accounts.

Finally, the relevant statute itself provides that "the failure, neglect, or refusal of the agent, servant, employee, trustee, bailee, or custodian to pay, deliver, or refund to his or her principal the money or property entrusted to his or her care upon demand is prima facie proof of

¹² *Hardiman, supra* at 424.

¹³ *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted).

¹⁴ *Lueth, supra* at 684.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

intent to embezzle.”¹⁸ Although this was not discussed in the trial or presented by the parties, the police investigator’s questions to Hines about the missing money could be considered requests to deliver or repay the missing funds, especially the \$1,000 that Hines claims was in an envelope in the store. Hines’ failure to inform anyone about the location of the cash can be construed as a refusal to return the money. It is, therefore, prima facie evidence of Hines’ intent to embezzle.¹⁹

In sum, we conclude that the prosecution presented sufficient circumstantial evidence to show that Hines took over \$1,000 from her employer and that she intended to defraud the company. Viewing that evidence in the light most favorable to the prosecution, a rational jury could find that the prosecution proved the essential elements of the crime, beyond a reasonable doubt.²⁰

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Bill Schuette

¹⁸ MCL 750.174(8).

¹⁹ *People v Phillips*, 170 Mich App 675, 677; 428 NW2d 739 (1988).

²⁰ *Hunter*, *supra* at 6.